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SUPREME COURT, U. S.

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SEP 15 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. [redacted] 217

JOHNNIEMAE PATTERSON TIETZ, et al.,
Appellants,

vs.

MICHAEL J. MARIENTHAL, et al.,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

APPELLANTS' REPLY TO APPELLEES' MOTION TO DISMISS

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IN THE

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OCTOBER TERM, 1965

No. 1399

JOHNNIEMAE PATTERSON TIETZ, et al.,
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vs.

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ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

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In reply to appellees' motion to dismiss, appellants will briefly emphasize the one point which appears to be governing upon all issues of the case as we see it. That is the question whether the school principals acted in such a manner as to make applicable the rule relating to discretionary power in an administrative function.

Point I of the Appellants' Jurisdictional Statement presents this question and quotes the statement by the court relative to the principals that the sole issue before the court is that of "discretion inherently or by law made a part of their respective positions." The argument of appellees joins issue on that point in their Argument No. I, pages 4,et seq.

DOES DISCRETION MEAN LICENSE TO COMMIT THE INTENTIONAL TORT OF THREAT AND DURESS?

Appellants contend that, if the principals exceeded their authority and discretionary powers and committed an intentional tort of threat and duress, such act is not within the exemption of discretionary power and furthermore, that in such a case, because of the exemptions of Government Code 905 (a) and Labor Code 3601 (a) the claims statutes do not apply and therefore that the decisions of the state courts are clearly, in this case, a denial of due process of law and of equal protection of law to plaintiff-appellants.

Accordingly, appellants desire to cite now only authorities defining discretion.

As stated in *Davis* v. *Shigley,* 100 N.E.2d 261, 263, 88 Ohio App. Ct. 23:

> "Discretion ordinarily means sound discretion, not wilful or arbitrary, but regulated by well known and established principles of law, or such as may be exercised without violating any principle of law."

An early opinion of the California Supreme Court in *Bailey v. Taaffe,* 29 Cal. 422, 427, which has been repeatedly quoted by California Courts, defines discretion, as follows:

"The discretion intended however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion to be exercised in conformity with the spirit of law, and in a manner to subserve and not to impede or defeat the ends of substantial justice."

Atkinson v. *Atkinson*, 35 Cal.App.2d 748, 753, 96 P.2d 824, 825;

See also *Osborn* v. *United States Bank*, 22 U.S. (9 Wheat.) 838, 866, 6 L.ed. 204.

Chief Justice Marshall there held discretion is "the will of law," and not of the judge or person.

People v. *Calvert*, 277 P.2d 834, 837, 838, 129 Cal. App.2d 693, 697;

Merritt v. *School District*, 157 P.2d 989, 991, 22 Wash. 887;

Tice v. *State Industrial Accident Commission*, 195 P.2d 188, 191, 183 Ore. 593;

State ex rel. Robert v. *Knox*, 14 So.2d 262, 264, 153 Fla. 165;

Scott v. *City of LaPorte*, 68 N.E. 281, 162 Ind. 34.

As to whether appellants have sufficiently raised the federal question in the state court, appellees' Motion to Dismiss virtually admits Appellants' contention that it was presented in the plaintiffs' complaint, Paragraphs I and VIII of the first cause of action, and in each of Appellants' briefs on appeal.

(Their Argument No. I, pages 13 et seq.) See Point V, pp. 28-29, of Appellants' Jurisdictional Statement.

See the review of authorities in Stern and Gressman, Supreme Court Practice, § 3-27, pp. 94 et seq.

Respectfully,

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